

§ 382.17

Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 382.17 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account

37 CFR Ch. III (7–1–10 Edition)

for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

PART 383—RATES AND TERMS FOR SUBSCRIPTION TRANSMISSIONS AND THE REPRODUCTION OF EPHEMERAL RECORDINGS BY NEW SUBSCRIPTION SERVICES

Sec.

383.1 General.

383.2 Definitions.

383.3 Royalty fees for public performance of sound recordings and the making of ephemeral recordings.

383.4 Terms for making payment of royalty fees.

AUTHORITY: 17 U.S.C. 112(e), 114, and 801(b)(1).

SOURCE: 72 FR 72254, Dec. 20, 2007, unless otherwise noted.

§ 383.1 General.

(a) *Scope.* This part 383 establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by Licensees in accordance with the provisions of 17 U.S.C. 114, and the making of certain ephemeral recordings by Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period commencing from the inception of the Licensees' Services and continuing through December 31, 2010.

(b) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112 and 114 shall comply with the requirements of those sections and the rates and terms of this part.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this part, the rates and terms of any license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this part to transmissions with the scope of such agreements.

EFFECTIVE DATE NOTE: At 75 FR 14075, Mar. 24, 2010, § 383.1 was amended by removing “2010” and adding in its place “2015”; in paragraph (a) and by removing “112” and adding in its place “112(e)” in paragraph (b), effective Jan. 1, 2011.

§ 383.2 Definitions.

For purposes of this part, the following definitions shall apply:

(a) *Applicable Period* is the period for which a particular payment to the designated collection and distribution organization is due.

(b) *Bundled Contracts* means contracts between the Licensee and a Provider in which the Service is not the only content licensed by the Licensee to the Provider.

(c) *Copyright Owner* is a sound recording copyright owner who is entitled to receive royalty payments under 17 U.S.C. 112(e) or 114(g).

(d) *License Period* means the period commencing from the inception of the Licensees’ Services and continuing through December 31, 2010.

(e) *Licensee* is a person that has obtained statutory licenses under 17 U.S.C. 112 and 114, and the implementing regulations, to make digital audio transmissions as part of a Service (as defined in paragraph (h) of this section), and ephemeral recordings for use in facilitating such transmissions.

(f) *Provider* means a “multichannel video programming distributor” as that term is defined in 47 CFR 76.1000(e); notwithstanding such definition, for purposes of this part, a Provider shall include only a distributor of programming to televisions, such as a cable or satellite television provider.

(g) *Revenue*. (1) “Revenue” means all monies and other considerations, paid or payable, recognizable during the Applicable Period as revenue by the Licensee consistent with Generally Accepted Accounting Principles (“GAAP”) and the Licensee’s past practices, which is derived by the Licensee from the operation of the Service and shall be comprised of the following:

(i) Revenues recognizable by Licensee from Licensee’s Providers and directly from residential U.S. subscribers for Licensee’s Service;

(ii) Licensee’s advertising revenues recognizable from the Service (as

billed), or other monies received from sponsors of the Service if any, less advertising agency commissions not to exceed 15% of those fees incurred to a recognized advertising agency not owned or controlled by Licensee;

(iii) Revenues recognizable for the provision of time on the Service to any third party;

(iv) Revenues recognizable from the sale of time to Providers of paid programming, such as infomercials, on the Service;

(v) Where merchandise, service, or anything of value is receivable by Licensee in lieu of cash consideration for the use of Licensee’s Service, the fair market value thereof or Licensee’s prevailing published rate, whichever is less;

(vi) Monies or other consideration recognizable as revenue by Licensee from Licensee’s Providers, but not including revenues recognizable by Licensee’s Providers from others and not accounted for by Licensee’s Providers to Licensee, for the provision of hardware for the Service by anyone and used in connection with the Service;

(vii) Monies or other consideration recognizable as revenue for any references to or inclusion of any product or service on the Service; and

(viii) Bad debts recovered regarding paragraphs (g)(1)(i) through (vii) of this section.

(2) “Revenue” shall include such payments as set forth in paragraphs (g)(1)(i) through (viii) of this section to which Licensee is entitled but which are paid or payable to a parent, subsidiary, division, or affiliate of Licensee, in lieu of payment to Licensee but not including payments to Licensee’s Providers for the Service. Licensee shall be allowed a deduction from “Revenue” as defined in paragraph (g)(1) of this section for bad debts actually written off during the reporting period.

(h) A *Service* is a non-interactive (consistent with the definition of “interactive service” in 17 U.S.C. 114(j)(7)) audio-only subscription service (including accompanying information and graphics related to the audio) that is transmitted to residential subscribers of a television service through

§ 383.3

37 CFR Ch. III (7–1–10 Edition)

a Provider which is marketed as and is in fact primarily a video service where

(1) Subscribers do not pay a separate fee for audio channels.

(2) The audio channels are delivered by digital audio transmissions through a technology that is incapable of tracking the individual sound recordings received by any particular consumer.

(3) However, paragraph (h)(2) of this section shall not apply to the Licensee's current contracts with Providers that are in effect as of the effective date of this part if such Providers become capable in the future of tracking the individual sound recordings received by any particular consumer, provided that the audio channels continued to be delivered to Subscribers by digital audio transmissions and the Licensee remains incapable of tracking the individual sound recordings received by any particular consumer.

(i) *Subscriber* means every residential subscriber to the underlying service of the Provider who receives Licensee's Service in the United States for all or any part of a month; provided, however, that for any Licensee that is not able to track the number of subscribers on a per-day basis, "Subscribers" shall be calculated based on the average of the number of subscribers on the last day of the preceding month and the last day of the applicable month, unless the Service is paid by the Provider based on end-of-month numbers, in which event "Subscribers" shall be counted based on end-of-month data.

(j) *Stand-Alone Contracts* means contracts between the Licensee and a Provider in which the only content licensed to the Provider is the Service.

EFFECTIVE DATE NOTE: At 75 FR 14075, Mar. 24, 2010, § 383.2 was amended by removing "2010" and adding in its place "2015" in paragraph (d); and by removing "112" and adding in its place "112(e)" in paragraph (e), effective Jan. 1, 2011.

§ 383.3 Royalty fees for public performances of sound recordings and the making of ephemeral recordings.

(a) *Royalty rates.* Royalty rates for the public performance of sound recordings by eligible digital transmissions made over a Service pursuant to 17 U.S.C. 114, and for ephemeral recordings of sound recordings made pur-

suant to 17 U.S.C. 112 to facilitate such transmissions, are as follows. Each Licensee will pay, with respect to content covered by the License that is provided via the Service of each such Licensee:

(1) For Stand-Alone Contracts, the greater of:

(i) 15% of Revenue, or

(ii) The following monthly minimum payment per Subscriber to the Service of such Licensee—

(A) From inception through 2006: \$0.0075

(B) 2007: \$0.0075

(C) 2008: \$0.0075

(D) 2009: \$0.0125

(E) 2010: \$0.0150 and

(2) For Bundled Contracts, the greater of:

(i) 15% of Revenue allocated to reflect the objective value of the Licensee's Service, or

(ii) The following monthly minimum payment per Subscriber to the Service of such Licensee:

(A) From inception through 2006: \$0.0220

(B) 2007: \$0.0220

(C) 2008: \$0.0220

(D) 2009: \$0.0220

(E) 2010: \$0.0250

(b) *Minimum fee.* Each Licensee will pay an annual, non-refundable minimum fee of one hundred thousand dollars (\$100,000), payable on January 31 of each calendar year in which the Service is provided pursuant to the section 112 and 114 statutory licenses, but payable pursuant to the applicable regulations for all years 2007 and earlier. Such fee shall be recoupable and credited against royalties due in the calendar year in which it is paid.

EFFECTIVE DATE NOTE: At 75 FR 14075, Mar. 24, 2010, § 383.3 was amended by removing "112" and adding in its place "112(e)" and by adding "during the License Period," after "such transmissions," in paragraph (a) introductory text; in paragraph (a)(1)(ii)(E), by removing "and"; by adding new paragraphs (a)(1)(ii)(F) through (J); by adding new paragraphs (a)(2)(ii)(F) through (J); in paragraph (b), by removing "112" and adding in its place "112(e)"; and by adding a new paragraph (c), effective Jan. 1, 2011. For the convenience of the user, the added text is set forth as follows:

§ 383.3 Royalty fees for public performances of sound recordings and the making of ephemeral recordings.

- (a) * * *
- (1) * * *
- (ii) * * *
- (F) 2011: \$0.0155
- (G) 2012: \$0.0159
- (H) 2013: \$0.0164
- (I) 2014: \$0.0169
- (J) 2015: \$0.0174 and
- (2) * * *
- (ii) * * *
- (F) 2011: \$0.0258
- (G) 2012: \$0.0265
- (H) 2013: \$0.0273
- (I) 2014: \$0.0281
- (J) 2015: \$0.0290

* * * * *

(c) *Ephemeral recordings.* The royalty payable under 17 U.S.C. 112(e) for the making of phonorecords used by the Licensee solely to facilitate transmissions during the License Period for which it pays royalties as and when provided in this part shall be included within, and constitute 5% of, such royalty payments.

§ 383.4 Terms for making payment of royalty fees.

(a) Subject to the provisions of this section, terms governing timing and due dates of royalty payments, late fees, statements of account, audit and verification of royalty payments and distributions, cost of audit and verification, record retention requirements, treatment of Licensees' confidential information, distribution of royalties, unclaimed funds, designation and definition of the collection and distribution organization, and any definitions for applicable terms not defined herein and not otherwise inapplicable shall be those adopted by the Copyright Royalty Judges for subscription transmissions and the reproduction of ephemeral recordings by preexisting satellite digital audio radio services in Docket No. 2006-1 CRB DSTRA ("the SDARS Proceeding").

(b) Without prejudice to any applicable notice and recordkeeping provisions, statements of account shall not require reports of performances.

(c) If the Copyright Royalty Judges adopt reports of use regulations in the SDARS Proceeding, those regulations, if any, shall govern Licensees' obligations to report sound recordings used pursuant to this part, except that Li-

censees also shall report to SoundExchange which channels are transmitted by their respective Providers for all past, current and future periods. In the event that the Copyright Royalty Judges do not adopt reports of use regulations in the SDARS Proceeding, then reports of use provided by XM Satellite Radio, Inc. ("XM") and Sirius Satellite Radio, Inc. ("Sirius") for their use of sound recordings on their preexisting satellite digital audio radio services (as defined in 17 U.S.C. 114(j)(10)) shall be deemed to satisfy XM's and Sirius' obligations to report sound recordings used pursuant to this part, and MTV Networks shall provide census reporting, retroactive to the inception of its Service.

EFFECTIVE DATE NOTE: At 75 FR 14075, Mar. 24, 2010, § 383.4 was revised, effective Jan. 1, 2011. For the convenience of the user, the revised text is set forth as follows:

§ 383.4 Terms for making payment of royalty fees.

(a) *Terms in general.* Subject to the provisions of this section, terms governing timing and due dates of royalty payments to the Collective, late fees, statements of account, audit and verification of royalty payments and distributions, cost of audit and verification, record retention requirements, treatment of Licensees' confidential information, distribution of royalties by the Collective, unclaimed funds, designation of the Collective, and any definitions for applicable terms not defined herein and not otherwise inapplicable shall be those adopted by the Copyright Royalty Judges for subscription transmissions and the reproduction of ephemeral recordings by preexisting satellite digital audio radio services in 37 CFR part 382, subpart B of this chapter, for the license period 2007-2012. For purposes of this section, the term "Collective" refers to the collection and distribution organization that is designated by the Copyright Royalty Judges. For the License Period through 2015, the sole Collective is SoundExchange, Inc.

(b) *Reporting of performances.* Without prejudice to any applicable notice and recordkeeping provisions, statements of account shall not require reports of performances.

(c) *Applicable regulations.* To the extent not inconsistent with this part, all applicable regulations, including part 370 of this chapter, shall apply to activities subject to this part.